United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2319 B P/S

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA

—against—

FRANK BREENE and JOHN INDIVIGLIO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANT INDIVIGLIO

JOSEPH WINSTON
Attorney for Defendant-Appellant
John Indiviglio
101 Park Avenue
New York, N.Y. 10017
MU 6-6780

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2319

UNITED STATES OF AMERICA,

Appellee,

-against-

FRANK BREENE and JOHN INDIVIGLIO,

Defendants-Appellants.

BRIEF FOR APPELLANT INDIVIGLIO

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether in taking the evidence most favorable to the Government, the prosecution had proved Indiviglio's participation in the conspiracy by a fair preponderance of the evidence, independent of co-conspirators' declarations.

2. Whether prejudicial error was committed by the trial Judge when, over objection, he permitted the jury to hear the prosecutor's summation twice, not once, although all parties agree that a summation is not evidence.

3. Whether prejudicial error was committed when the trial Judge permitted evidence to go in after September 27, 1972 allegedly for the purpose of impeaching Breene's credibility but actually, in effect, depriving Indiviglio of a fair trial (p.620ff). *

4. Whether prejudicial error was committed with respect to Indiviglio when, in a thin case against him, the following occurred:

(a) The Court erred in denying defendant Indiviglio's motion for a dismissal of indictment made at the close of the Government's case and renewed at the close of the entire case.

(b) The Court allowed into evidence the following paraphenalia which contained no trace of heroin or other illegal substances, although tested for same in a police laboratory: flasks, beakers, test tubes, clamps, stands, delicatessen scales, postage scale, mineral oil, and permitted the jury to view them during the entire trial.

(c) The Court allowed into evidence currency in the sum of $350,000 which remained in full view of the jury during the entire trial, although same was never connected to or claimed by Indiviglio, nor was there any evidence showing

*References to the trial minutes are by page number. References to the Appendix are prefaced by "A".

ownership of same by Indiviglio.

(d) The Court allowed to be read into evidence letters from Europe signed "BOB" which made no mention of importing heroin in cars or anything related to the charges in the indictment and concerned the business matters of a legitimate foreign corporation but which were highly prejudicial to Indiviglio in that comments were made as to the hidden or underlying meaning of the plain written words.

STATEMENT PURSUANT TO RULE 28

Preliminary Statement

This is an appeal from a judgment of conviction rendered on August 16, 1974 in the U.S. District Court for the Eastern District of New York (Mishler, Chief Judge) convicting appellant, JOHN INDIVIGLIO, after a jury trial of conspiring and agreeing with Frank Aguiar, James McCormack and with others to violate, prior to May 1, 1971, Sections 173 and 174 of Title 21 U.S.C. and after May 1, 1971 to violate Sections 812, 841(a)(1), 841(b)(1)(a), 951(a)(1) and 952 of Title 21, United States Code.

The defendant, JOHN INDIVIGLIO, was sentenced to twelve years of confinement and to special parole term of five years. The defendant, JOHN INDIVIGLIO, is 60 years of age, was never convicted of any crime, except in the instant case, and is out on bail.

STATEMENT OF FACTS

The Indictment

The indictment charges that between the 1st day of October, 1967 and the 27th day of September, 1972, defendants, THOMAS MATTEO, FRANK BREENE and JOHN INDIVIGLIO, wilfully, unlawfully and knowingly did combine and conspire and agree with each other and with FRANK AGUIAR and JAMES McCORMACK and others to violate prior to May 1, 1971 Sections 173 and 174 of Title 21 of United States Code and after May 1, 1971 to violate Sections 812, 841(a)(1), 841 (b)(1)(A), 951(a)(1) and 952 of Title 21, United States Code.

The indictment further charges that prior to May 1, 1971 it was part of the conspiracy for the said defendants to unlawfully, wilfully and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of heroin. It was further part of the conspiracy that after May 1, 1971, the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance.

The indictment further charges as overt acts against Indiviglio that on February 1, 1968 defendant Matteo met

with Indiviglio and that on September 27, 1972, defendant Matteo traveled to John Indiviglio's home.

No proof was adduced at the trial by any Government agent, convicted felon or other witness that in fact anyone had seen defendant, Indiviglio, at any time sell, offer to sell or participate in a sale of any heroin or other illegal drug.

Nobody, of course, testified that there was any agreement involving Indiviglio. One of the real questions presented was whether any direct non-hearsay evidence was introduced from which the jury could infer there was an agreement to which Indiviglio was a party. It is respectfully submitted that no such evidence was introduced. There was no criminal act (except hearsay). No one ever saw Indiviglio participate in any illegal distribution. No Government agent testified that Indiviglio sold or offered for sale any illegal drugs.

The only evidence against Indiviglio was of the most tenuous nature based upon hearsay of alleged conspirators. For example, Mr. Somas, a convicted felon, testified that although there were no drugs in Indiviglio's apartment (A27), he had a conversation with Mr. Matteo that Indiviglio has a drug connection in France (A22).

Mrs. Somas, another convicted felon, on direct examination said that Indiviglio said to Tyler that he had made millions (A40).

Aguiar testified that he cut heroin for McCormack and McCormack stated that he got it from Indiviglio (A55). This is just about double hearsay.

The Government put into evidence flasks, beakers, test tubes, stands, delicatessen scales, postage scale and mineral oil (Exhibit 45) without a trace of any drug on them. Concededly, they could have been used only for legal purposes. More important, no one ever saw them used for illegal purposes and tests did not reveal the presence of any dangerous drug (A67). The following is the pertinent testimony (A67-A69):

> "Q Officer, those tests, did they reveal the presence of any dangerous drug?
> A No, sir, they didn't.
> Q Now I believe it was your testimony that this face mask or one like this is commonly used to filter heroin from coming into the user's face so he doesn't become addicted.
> A Yes, sir.
> Q And there was no trace of any heroin on that face mask?
> A No, sir.
> Q Now, officer, in the course of your work, is it common to use inaccurate scales of this type (indicating)?

MR. WEINTRAUB: Object to the characterization.
THE COURT: Sustained.
MR. ABRUZZO: I'm sorry.
Q In the course of your work, Officer, is a scale of this type, is it commonly used in the weighing of narcotics (indicating)?
A No, no, sir.
Q Can you tell us why that type of scale isn't commonly used?
A It is not calibrated sufficiently for accuracy, sir.
Q How about this one (indicating)?
A Yes, sir, it is.
Q This, a postage scale?
A Yes, sir.
Q To weigh large amounts?
A No, sir.
Q How about this heating lamp, is this the kind of lamp that is commonly used?
A It can be used.
Q Can be?
A Yes, sir.
Q But it is not what is commonly used, they usually use some kind of heat.
A It is not in common usage, they usually--
Q So these aren't common devices?
A They can use anything.
Q They can use anything, but these have other uses, obviously?
A Certainly.
Q And obviously this can run a kid's toy to make it smoke (indicating mineral oil)?
A Yes, sir.
Q And is this an instrument for which a man of the age of Mr. Indiviglio might use to heat his back?
A Yes, sir.
Q I don't think it is uncommon for a person to have a Bunsen burner in his house that lives in Long Island; right?
A No, sir, it is not uncommon."

The Government also had admitted into evidence letters where no mention was ever made of any narcotics, but an agent stated that one word "dresses" meant narcotics.

Finally, Breene testified that he never bought or sold narcotics from Indiviglio (A96).

As overt acts affecting Indiviglio, the Government alleged that on February 1, 1968, defendant Matteo met with McCormack and Indiviglio at the home of McCormack in the Eastern District of New York.

But in the trial itself, there is not one scintilla of evidence that, assuming these meetings took place, any illegal act occurred. No one testified that drugs passed at any of these meetings and that moneys passed or that anything illegal had occurred. For all that appears, they may have discussed a football game or a basket ball game.

A United States officer, Agent Thompson, testified that a "dress" meant "narcotics" but the word in all the letters was only used once. What makes it so strange is that the officer concedes that the letter deals with a formula and in all his professional work as an officer he never saw a formula for overseas purposes (A77). The Government concedes

that the corporation of Indiviglio was a legitimate corporation.

Also, the sum of $350,000 was found in a house where Indiviglio (and others) reside and in which home Matteo was shot. In addition to this, a search of the home revealed no heroin, no narcotics, no controlled substances, but there was admitted in evidence beakers, flasks, weighing machines, etc. The Government concedes that no heroin was located in or on this equipment and that all of the said equipment could have been used for legal purposes. Finally, after it was introduced into evidence and read to the jury, the jury was aware of Exhibit 49, the Government conceded belatedly that hydro-chloric acid was too weak to be used for narcotic purposes and then asked that it be removed as an Exhibit (p.475). But during the entire trial, all the said equipment was in evidence and all the money in evidence was visible to the jury. These mute daily witnesses plus a rereading of the prosecutor's summation tipped the scale against Indiviglio. The said defendant Indiviglio maintains that a judgment of acquittal should have been granted in view of the fact that no independent evidence was presented from which an agreement or illegal act by him could be inferred.

The pertinent parts of p.475 read as follows:

> "THE COURT: You are making further representations. I hope you do not change your mind.
> You are saying that this chemist says it cannot be used in this type of work, in the processing--
> MR. WEINTRAUB: Not in that concentration. He says it could in a greater concentration.
> The concentration shown here, he says, could not be used.
> THE COURT: You are ready to withdraw that and make the statement?
> Do not come back in an hour or tomorrow morning and say, "Judge, I made a mistake."
> MR. WEINTRAUB: I will stand by the statement, your Honor.
> If I am mistaken, then I am stuck with it.
> THE COURT: Maybe you ought to find out what it can be used for. Maybe an eyewash. I do not know.
> All right, what is the exhibit number?
> MR. WEINTRAUB: Both were in Exhibit 49.
> THE COURT: I will strike those documents from the exhibit.
> Did you read those both to the jury?
> MR. WEINTRAUB: Yes, your Honor."

It is respectfully submitted that at the end of the case, a judgment of acquittal should have been granted as against Indiviglio.

SUMMARY OF ARGUMENT

The defendant, Indiviglio, was charged as a conspirator with Aguiar, McCormack and others in a scheme to sell and distribute heroin. McCormack never testified at the trial at all. The testimony of alleged participation by Somas, Breene and Aguiar did not involve any substantive act of illegality by Indiviglio. The only overt acts charged against Indiviglio in furtherance of the conspiracy were as follows:

> "1. On or about February 1st, 1968, the defendant Thomas Matteo met with co-conspirator James McCormack and Defendant John Indiviglio at the home of McCormack in the Eastern District of New York.
>
> 5. On or about September 27, 1972, the defendant Thomas Matteo travelled and entered the home of defendant John Indiviglio in the Eastern District of New York."

Assuming that the alleged conspirators did meet with Indiviglio or did travel to his home (which Indiviglio submits has not been proved), what inference can be drawn from these two items? There is no direct testimony that in 1968 Indiviglio performed any illegal act, there is no testimony as to any conversation that took place involving illegal acts, no one testified that at these meetings anyone offered to sell or actually did sell drugs, no agent

testified that he saw the transfer of drugs or money; the same thing could be said about the meeting on September 27, 1972. The jury is being asked to infer that such a meeting took place, that some unknown unlawful conversation subsequently occurred and from this inference upon inference that during the conversation something was said about drugs. The jury is then further asked to infer that Indiviglio participate in some illegal activity. How far can one push mere suspicion, inference upon inference, and surmise? The crucial thing is at these so called meetings, assuming that they ever took place, nobody testified to anything involving illegal activities.

The case against Indiviglio is thinner than the case against Gutierrez in United States v. Cirillo, 499 F.2d 872 (2nd C 1974) where the Court, in dismissing the narcotic charge nst him, stated (at p.884):

> "There was no evidence whatsoever of what was discussed and of what transpired at these meetings, or of any possession of narcotics by Guitierrez. Nor was there any non-hearsay evidence of any participation by him in any purchase or sale. Clearly this proof was insufficient to permit the Court to find by a fair preponderance that he had participated.

> While the two visits raised suspicion, suspicion is not enough."

The most that can be said in favor of the Government is that it proved a possible association between Indiviglio and other criminals. But in the words of Judge Mansfield in the Cirillo case, supra:

> "In light of the government's failure to adduce any non-hearsay evidence that Gutierrez was aware of the narcotics transaction, we are constrained to hold that it proved no more than mere association between Gutierrez and Venetucci, which cannot be the basis for an inference of guilt." (Citations omitted)

Nor is the evidence against Indiviglio any stronger than the evidence against Freeman in United States v. Freeman, 498 F.2d 569 (2nd Cir., 1974) where this Court held there was no showing that any act of the defendant "was done in furtherance of a prior criminal agreement among conspirators".

What the Government could not prove by any direct evidence, independent of co-conspirators' hearsay, it tried to prove by putting into evidence legal paraphernalia and asking the jury to bridge the gap between legality and illegality.

Finally, as a coup degrâce against Indiviglio, the Government permits a rereading of the prosecutor's summation. This fatally affected a fair trial.

A R G U M E N T

POINT I

THE GOVERNMENT DID NOT PROVE INDIVIGLIO'S PARTICIPATION IN ANY CONSPIRACY BY A FAIR PREPONDERANCE OF THE EVIDENCE, INDEPENDENT OF CO-CONSPIRATOR'S DECLARATIONS

The Court will note after reading the record that nobody (a) ever found narcotics in the possession of Indiviglio; (b) purchased any narcotics from him; (c) sold any narcotics to him; or (d) paid any money to him for narcotics.

This is in the words of Judge FRIENDLY dissenting in United States v. Frattini, 501 F.2d 1234 (2nd Cir., 1974) the rare narcotics case where defendant Indiviglio may be innocent. It is the contention of the defendant that the People have totally failed to prove an agreement by Indiviglio to commit an offense, that no independent testimony stands from which it can be inferred by a preponderance of the evidence that an agreement existed involving Indiviglio, that there has not been established any agreement or overt act by Indiviglio and that the prosecution has totally failed to prove Indiviglio's participation in any conspiracy by a fair preponderance of the evidence, independent of the alleged co-conspirators' declarations.

We all recognize that mere knowledge, approval or acquiescence without an agreement is not sufficient to make defendant a co-conspirator.

We all know, lawyers as well as judges, of the catalogues of prosecutorial evils inherent in a conspiracy trial. Inevitably, in a conspiracy trial, the focus of attention shifts from individual guilt toward guilt by association. While all Courts agree and affirm that mere association with others is not enough evidence to support a guilty verdict (United States v. Arroyave, 477 F.2d 157 (5th Cir., 1973); United States v. Di Re 159 F.2d 818 (2nd Cir.,1947) aff'd, 332 U.S. 581 (1948); Ong Way Jong v. United States, 245 F.2d 392, 394 (9th Cir., 1957), this rule is often overlooked in the fracas of an actual trial. Since in a conspiracy prosecution, the act of any alleged conspirator is attributable to the other, is admissible in evidence, and may be proved by the most tenuous circumstantial evidence, with hearsay evidence going so far as to violate one's constitutional right to confront one's accusers, then the rule against guilt by association becomes terribly diluted. Such, we respectfully submit, is the case here with Mr. Indiviglio. Fortunately, this Circuit has made valiant efforts to insure a fair trial in a conspiracy case. We start off with the

rule that there must be sufficient evidence of Indiviglio's participation in the conspiracy, independent of hearsay evidence admitted pursuant to the co-conspirator exception. Brown v. United States, 150 U.S. 93, 14 S.Ct. 37 (1893). Then we have this salutory admonition (United States v. Santana, 503 F.2d 710 (2nd Cir., 1974)):

> "The settled rule in this Circuit, see United States v. Geaney, 417 F.2d 1116, 1120 (1969), cert. denied sub. nom. Lynch v. United States, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970), is that the jury will be permitted to consider such hearsay only if the trial judge determines that the prosecution has proved the defendant's participation in the conspiracy by a fair preponderance of the evidence independent of co-conspirators' declarations."

As is stated in United States v. Randall, 503 F.2d 50 (6th Cir., 1974):

> "A prima facie case requires that there be evidence tending to show the existence of all the elements involved--i.e., substantial evidence that the accused knowingly associated himself with others in the commission of a particular crime. Ong Way Jong v.United States, 245 F.2d 392, 394, 396 (9th Cir., 1957; United States v. Spanos, 462 F.2d 1012, 1014 (9th Cir., 1972); Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 93 L.Ed. 790 (1948). See Mayola v. United States, 71 F.2d 65 (9th Cir., 1934); United States v. Peoni, 100 F.2d 401 (2nd Cir., 1938). See also, Levie, Hearsay and Conspiracy, 52 Mich. L.Rev. 1159, 1168 (1954)."

This Circuit has always reviewed the background of circumstantial evidence, including the defendant's activities and finds guilt only where the non-hearsay evidence is clearly sufficient to establish a defendant's participation in the conspiracy, independent of any hearsay evidence from co-conspirators. United States v. Ragland, 375 F.2d 471 (2nd Cir., 1967) cert. den. 390 U.S. 925 (1968); United States v. Marrapese, 486 F.2d 918, 921 (2nd Cir., 1973) cert. den. 415 U.S. 994 (1974); United States v. D'Amato, 493 F.2d 359 (2nd Cir., 1974); United States v. Santana, 503 F.2d 710 (2nd Cir., 1974); United States v. Mallah, 503 F.2d 971 (2nd Cir., 1974).

With these principles in mind, we turn to the prosecutor's case against defendant Indiviglio. As usual, the prosecutor has to rely upon scum of the earth in order to attempt a prima facie case against Indiviglio. Of course, it is for the jury to evaluate this testimony and we do not quarrel with the view that the jury may find the dregs of the earth trustworthy. However, what is important is that these dregs who wish to obtain freedom from further prosecution, are prepared to say literally anything in order to gain their freedom from jail. This is obviously the reason why the Court insists upon the cautionery instruction concerning

the reliability of statements by alleged accomplices. United States v. Randall, supra.

The first witness to appear for the prosecution was one Somas, a convicted felon. He really could say very little about implicating defendant Indiviglio in any direct transaction involving heroin. On A16 appears this testimony:

> "Q Were you present when heroin was given to Mr. Matteo or Mr. James McCormack by the defendant Mr. Indiviglio?
> A No I wasn't."

Under prodding by the Assistant U.S. Attorney, we have this question and answer (A18):

> "Q I ask you again, Mr. Somas, whether or not you were present when Mr. Indiviglio gave any drugs to either Mr. Matteo or Mr. McCormack?
> A I believe he might have given some to Mr. Matteo. You see, the samples were usually left in a place where Mr. Matteo would pick them up and give them to Mr. McCormack and Mr. McCormack would try them.
> Now, there might have been an occasion I was there when Joh handed them over. I'm not positive. It was a long time ago and my memory just is not that good."

Outside of this, we then have testimony that Mr. Somas had a conversation with Mr. Matteo where he stated that Indiviglio gets a connection for heroin in France (A22). This was the sum and substance of his testimony. He confirmed

that there were no illegal drugs in Indiviglio's apartment (A27).

Fay Somas, his girl friend and then his wife, testified that she saw different people delivering heroin (Matteo, Breene (A31)) but never Mr. John Indiviglio (A140):

"Q Was there any discussion of narcotics at that time?
A We didn't actually bring out the words heroin or drugs. They were discussing about the money that John had made.
Q What was said?
A John said he made millions.
Q Who had asked him?
A Tyler did.
Q Do you remember the words that Tyler used?
A I believe he just asked, approximately how much did he make during the years, and John replied, millions.
Q Was there any other discussion after that?
A They discussed a foreign car that John was importing into the United States.
Q What was said about that car, that foreign car?
A Tyler asked if he still had any left and John said yes, he had one."

Then was this question and answer (A41):

"Q Did Mr. Indiviglio say why he was importing cars into the United States?
A No, he didn't come right out and say why.
Q He didn't?
A No.
Q Did you tell me in my office on Sunday--
MR. KRIEGER: Objected to your Honor.

THE COURT: The jury may be excused.
(At 2:15 p.m., the jury withdrew from the courtroom and the following occurred out of hearing..."

This was the total amount of testimony with regard to FAY SOMAS. Aguiar had no direct relations with defendant Indiviglio. On A54 appeared this testimony:

"Q During the spring and summer of 1968,did you have any contact with a man named James McCormick?
A Yes.
Q How did you meet him?
A I met him through my brother-in-law but I had known him for a while before that anyway, you know, through the neighborhood.
Q What was Mr. McCormick doing for a living at that time, do you know?
A He was in the heroin business.
Q Did he tell you that?
A I cut some material in his apartment for him. It was his material.
Q What do you mean by material?
A Heroin. I cut it down.
Q Did he tell you where he got that heroin from?
A Yes.
Q What did he say?
A From Indiviglio, Charles Indiviglio.
Q What color was that?"

Then once again we have hearsay that McCormack told him that Indiviglio was supplying the heroin (A55). In more than 100 pages of testimony, this is the only reference to John Indiviglio.

Breene testified that he had absolutely no transactions with Indiviglio (A96):

> "Q Now did you ever engage in any business or any partnership or any agreement or arrangement with either Mr. Somas, Mrs. Somas, Mr. Aguiar, Mr. Indiviglio, Mr. McCormack, Mr. Matteo or with any of the other people that have been mentioned in these past few days for the sale, distribution, storing, buying, selling or having anything to do with narcotics?
> A No, sir."

The indictment charges that between October, 1967 and September 27, 1972, defendant, JOHN INDIVIGLIO, did conspire with FRANK AGUIAR and JAMES McCORMACK to violate the Narcotics Law.

Obviously, it was, therefore, crucial for the prosecution as part of its case to prove an agreement existed between Aguiar, McCormack and Indiviglio. A reading of the testimony of Somas reveals that he never saw any narcotics transactions involving John Indiviglio. Fay Somas testified that she never saw Indiviglio sell any drugs. However, after being prodded by the U.S. Attorney, she says that she heard that Mr. Indiviglio was importing drugs into the United States via automobiles. Aguiar testified that McCormack says he got heroin from Indiviglio.

McCormack never took the stand and never testified about anything. It, therefore, becomes crucial on the part of the prosecution to have independent testimony about Indiviglio's part in this alleged conspiracy and overt acts other than hearsay testimony. It is well known that there must be evidence of both an agreement and an overt act to establish a crime of conspiracy. An overt act without an agreement is insufficient. See United States v. Williams, 503 F.2d 50 (6th Cir., 1974):

> "Thus, with regard to Johnson, there is at most the showing of an overt act. This is insufficient to sustain a conspiracy conviction. United States v. Sarno, 456 F.2d 875 (1st Cir., 1972); Schnautz v. United States, 263 F.2d 525 (5th Cir., 1959); Hall v. United States, 109 F.2d 976 (10th Cir., 1940); cf. Condrey v. United States, 351 F.2d 456 (5th Cir., 1965)."

But in this sense, the case is barren of any evidence, as opposed to suspicion that defendant Indiviglio illegally acted. True enough and trying to tie the said defendant to the conspiracy, the prosecution did get admitted into evidence, flasks, beakers, test tubes, clamps, stands, delicatessen scales, postage scales and mineral oil. True enough, the prosecution did get admitted into evidence U.S. currency in the sum of $350,000 which was seized in a home

where defendant Indiviglio resided (but did not own), and true enough the defendant did get admitted into evidence letters from Europe signed "Bob" which made no mention of importing heroin in cars or anything related to the charges in the indictment and were concerning the business matters of a legitimate foreign corporation. But they were highly prejudicial in that comments were made as to the hidden or underlying meaning of the plain written words of the letters. What is more important is that no government agent ever testified that the paraphernalia had any traces of heroin on it. Nobody introduced any testimony that the said equipment in fact was used for illegal purposes or ever had been used for illegal purposes. Nobody proved that the money, or any part of it, belonged to Indiviqlio, and there is no direct testimony in the letters of narcotics at all. When viewed in the cold light of reason, the most that could be said is that suspicions are aroused. But this Court does not permit a conviction of a 60 year old man heretofore never convicted of any crime to rest on mere suspicion or surmise, or inference drawn upon inference. Some direct evidence had to go in, independent of co-conspirator's statements, in order to sustain a conviction of Indiviglio. This we submit is plainly lacking in this case.

POINT II

REVERSIBLE ERROR WAS COMMITTED BY THE COURT WHEN THE TRIAL JUDGE ALLOWED THE PROSECUTOR'S SUMMATION TO BE REREAD TO THE JURY A SECOND TIME AFTER THE JURY HAD RETIRED TO DELIBERATE

As far as defendant Indiviglio is concerned, this is a very close case. It is respectfully pointed out that a directed verdict should have been granted with regard to him since indeed there was no independent evidence linking him to the commission of any substantive crime. The Court permitted a great deal of paraphernalia to be permitted in evidence but nobody testified that the paraphernalia had any heroin or other illegal narcotics in it. No one testified that they saw Indiviglio use this paraphernalia for illegal purposes. In fact, the direct testimony is that the defendant's son utilized the paraphernalia since he was an amateur chemist. The Government concedes that part of the paraphernalia was properly usable for regular commercial business purposes (A67-70).

Then after the Government lets the evidence in and permits the jury to view the paraphernalia for many days at the trial of the action, the Government concedes error in introduction of evidence and withdraws the exhibit dealing with hydrochloric acid (p.475).

However, in full view of the jury is $350,000 in cash

seized at a home. Nobody alleges that the money belongs to Indiviglio, nobody connected him with the money, nobody proved, directly or indirectly, that it was his money. However, the money was in full view of the jury for days along with the equipment and the obvious purpose was to insinuate to the jury that somehow Indiviglio was connected with all this. With the case in this posture, the jury comes in, after deliberation, and requests the Judge to have reread the prosecutor's summation.

At A145 of the record the following colloquy appears concerning the reading of the prosecutor's summation to the jury:

> "Mr. Abruzzo: The summation is not evidence.
> The Court: I believe the jury is entitled to hear it once. They are entitled to hear it twice, and I don't select what they want to hear. I say in the fourteen years I'm sitting here it only happened twice; last week they wanted defendant's summation. I was surprised. I gave it to them and here it is the prosecutor's summation. They may want to see what he said can be sustained. It may be flattering to Mr. Weintraub that they want to hear what he said."
>
> "MR. WEINTRAUB: I don't consider it flattering.

> The Court: You don't know the reasons for it and I don't either. I have some faith in the jury, whatever reason, if they want it I'll give it to them."

It is obvious to this Court that the function of the Judge is to direct the course of the trial proceedings so as to protect impartiality (United States v. Pruitt, 487 F.2d 1241 (8th Cir., 1973).

As was stated by United States v. Green, 487 F.2d 1022 (5th Cir., 1973):

> "In the circumstances of this trial we think the court did not commit error prejudicial to the rights of the appellant. The admonition was properly given under the trial court's function of presiding over the trial and directing the course of trial proceedings so as to protect their impartiality. United States v. Jackson, 5 Cir., 1973, 470 F.2d 684, 687; United States v. Jenkins, 5 Cir. 1971, 442 F.2d 429, 434; Luttrell v. United States, 5 Cir., 1963, 462, 465-466. Affirmed."

The jury obviously had some question as to which it was uncertain or it would not have made its request. The Court had several alternatives. First, it could deny the jury's request and send them out again which would have served little purpose because there was obviously some question in the jurors' minds. Secondly, the Court could have invited the jury to be more specific and asked just what they wanted to hear from the prosecutor's summation and then

summarize the evidence that was received in the trial as to their particular question. Or, thirdly, the Judge could wrongfully have the prosecutor's summation reread to the jury even though the Court was well aware that the prosecutor's summation is not evidence. Faced with these three alternatives, the Court chose the wrong solution by permitting to be reread the prosecutor's summation until the jurors indicated that they had heard enough of the prosecutor's summation to make up their own minds. In the case of Powell v. United States, 347 F.2d 156 (9th Cir., 1965), the Court stated:

> "The meaning of the jury's inquiry was uncertain. All the inquiry made clear was that the jury was confused as to the legal standards to be applied in resolving the central factual issue upon which the defendant's guilt or innocence depended. The court made no effort to discover the nature of the jury's misunderstanding...Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the Judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach v. U.S. 326 U.S. 607, 612-613."

> "Particularly in a criminal trial the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge. 326 US 612."

What is clear about the instant case is that when the Judge received the jury's request for the prosecutor's summation, he did not ask the jury just what it wished to hear or what was the nature of their request. In fact, the Judge made absolutely no attempt to give the jury any form of guidance as to their requests. As the Court stated: "You don't know the reasons for it and I don't either". In a somewhat analogous situation in the case of People v. Miller, 6 N.Y.2d 152, 188 N.Y.S.2d 534 (1959), the jury, after hearing the summations and the Judge's Charge, retired and reappeared and asked the Judge for the possible verdicts. After several responses from the Judge, the Judge offered to reread his charge, if the jury wanted it. This was declined and the jury went back to deliberate and found the defendant guilty. The New York Court of Appeals in reversing the convictions stated (538-539):

> "The jury in this case from the record cited above was confused as to the elements of murder, of murder in the second degree, and the relation of the crimes of robbery and attempted robbery with these other crimes. These are serious questions for defendant's life depended upon the jury's proper understanding of the elements of each of these crimes. People v. Flynn 290 N.Y. 220. Hence it was the court's duty to answer the question, although it may have been imperfectly phrased. Indeed, the inartistic expression of these questions indicates an incomplete comprehension in the minds of the jury of the elements of the crimes involved. If the court did

> not understand the meaning of the questions, it was obliged to direct further inquires to the jury to ascertain their difficulties....Certainly a mere offer to reread the principal charge-although it was correct-would be of little help to a perplexed jury."

In the only reported Federal case in which a defense counsel's summation was requested by a jury in the case of United States v. Guanti, 421 F.2d 792 (2nd Cir., 1970), the Court stated at page 1160(a) of the record on appeal:

> "I have a copy of your note asking for a copy of Mr. LaRossa's summation. You can't have that. That's not evidence. That is an argument. You will have to remember it if you can remember it. He doesn't have two arguments."

On appeal, there was cited as error the supplementary charge given to the jury after they had been out for 24 hours. When the jury came in after 24 hours, it requested the defendant's summation. The Circuit Court of Appeals stated at 801:

> "There is also assigned as error a supplementary charge given to the jury after it had been out for 24 hours. The jury returned a verdict of guilty as to all defendants five to twenty minutes after the supplementary instruction. The jury requested a summation of Dominick's counsel. Since this was not evidence, the request was denied. The trial judge then gave a restatement of the elements of conspiracy with a statement of the law relating to withdrawal.

> He did not give a specific charge as to Dominick since he feared that that would suggest that withdrawal was the only issue as to him or that only his guilt was questionable. This was not objected to as an erroneous statement of law but as unresponsive to the request. There was no error in giving this instruction."

The problem here is twofold. First, the instant jury asked the Judge for the prosecutor's summation. No inquiry, not even an attempt was made, by the Court to determine what the jury wanted to know. This occurred despite the fact that this is a serious crime that the defendants were charged with and the Judge has a clear duty to make an elementary inquiry into the jury's matters of concern. Secondly, failing to make any inquiry, the Judge, in effect, gave Carte Blanche to the jury by allowing the prosecutor's summation to be read until the jury was satisfied. No one seriously contends that a summation is evidence admitted during a trial. Rather, it represents an argument of an attorney with various inferences with which he attempts to persuade a jury from the evidence that has been introduced in trial. In United States v. Adams, 385 F.2d 548 (2nd Cir., 1967), this Court reversed a narcotics conviction despite

clear evidence of guilt since a narcotic's agents letters were given to the jury and they had not been received in evidence. This Court stated at pages 550-551:

> "But the principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted."

Therefore, the defendant was prejudiced by a failure of the Judge to make any inquiry into the jury's problem and fatally prejudiced by having the prosecutor's summation read back to the jury.

While the Court offered a cursory cautionary instruction that the summation did not represent evidence, in effect, the Court's action is tantamount to telling the jury not to think of a white horse.

The government benefitted by having its theory of the case presented twice to the jury to the defendant's prejudice and without affording the defendant an opportunity to reply to cure this error.

POINT III

THE PARAPHERNALIA, LETTERS, AND COLLATERAL TESTIMONY OF OFFICERS BROPHY AND O'CONNOR PROVE NO ILLEGAL ACTION ON THE PART OF INDIVIGLIO

The Government, in an effort to provide independent evidence of Indiviglio's participation, had admitted into evidence various materials like beakers, flasks, delecatessen scales, hydrochloric acid, etc. Nobody testified to having seen any illegal use of any of these materials by Indiviglio. Then letters were introduced into evidence and read to the jury. This hearsay evidence was again designed for the same purpose.

When it became clear from a scientific point of view that the hydrochloric acid could never be used in any fashion for the illegal purpose in this case, the Government then moved to withdraw this exhibit (after it had been read by the jury).

Finally, in another strenuous effort to close the gap in order to prove Indiviglio's participation in the conspiracy, the Government had two agents testify, to wit: Special Agent Brophy (p.610ff) and Special Agent O'Connor (p.709ff).

But did their testimony implicate Indiviglio with any illegal act? Did they state that they saw the passing of narcotics or money? Not at all.

Agent Brophy testified that on May 25, 1974, long after the alleged conspiracy had ended, he saw Frank Breene and Indiviglio standing together for 15 or 20 minutes (p.610). Agent O'Connor testified that he saw Breene and a big black male, 250 pounds (p.711) together with Indiviglio remain together a few minutes and then the two of them, i.e., Breen and Indiviglio, walk outside (p.712). This was the substance of their testimony. Legally, the evidence was collateral evidence to impeach the credibility of Breene. Actually, the purpose of this testimony was to get across to the jury that some sinister purpose, that some illegal act had been commited by Indiviglio since he was seen in the presence of a big black male and Breene. Once again, instead of some direct participation, we are left with surmise, suspicion, inference. This is not the type of independent evidence this Court has required to prove participation in a conspiracy.

CONCLUSION

THE CONVICTION OF JOHN INDIVIGLIO SHOULD BE REVERSED AND THE CASE AGAINST HIM SHOULD BE DISMISSED

Respectfully submitted,

JOSEPH WINSTON
Attorney for Defendant-Appellant
JOHN INDIVIGLIO
Post Office Address
101 Park Avenue
New York, N.Y. 10017
(212) MU 6-6780

C 321—Affirmation of Service by Mail.
Affidavit of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS : SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff

against

FRANK BREENE and JOHN INDIVIGLIO,

Defendants-Appellants.

Defendant

Index No.

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is associated with the JOHN INDIVIGLIO attorney(s) of record for

That on the 20 day of December 19 74 deponent served the annexed BRIEF on U.S. ATTROMEY for the Esatern Dist. of N.Y. and THEODORE KRIEGER ESQ? attorney(s) for United States and Co-Defendant BREENE, respectively in this action at 225 Cadman Plaza East, N.Y. and 401 Bdwy, N.Y., respectively the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this 20 day of December 19 74

The name signed must be printed beneath

STANLEY S. GETZOFF

Attorney at Law

C 321—Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me

this day of 19 .....

The name signed must be printed beneath